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FOR ARGUMENT

No. 77-1715

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

SECRETARY OF PUBLIC WELFARE, Commonwealth of Pennsylvania, ALDO COLAUTTI; JOHN FONG, Director of Haverford State Hospital; NICHOLAS D'ALUISIO, Director of Polk State School and Hospital; C. DUANE YOUNGBERG, Director of Pennhurst State School and Hospital, sued as representatives of all others similarly situated,

Appellants,

v.

INSTITUTIONALIZED JUVENILES in Pennsylvania institutions for the mentally ill and the mentally retarded, namely, KEVIN S.; RICHARD S.; JAMES PAUL M.; EDWARD B.; RAYMOND C.; WILLIAM B.; FRANCIS B.; MARIA L.; THOMAS W.; NANCY LOUISE D.; GINA S.; and GEORGE S., by their next friend and guardian ad litem, David Ferleger, individually and on behalf of all others similarly situated,

Appellees.

On Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania

BRIEF OF THE AMERICAN BAR ASSOCIATION AMICUS CURIAE

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BRIEF OF THE AMERICAN BAR ASSOCIATION AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American Bar Association is a national membership organization of the legal profession. It counts as members more than 220,000 lawyers from all states and the District of Columbia and has, since 1944, maintained an active interest in the field of mental disability law.[1] This interest was intensified in 1973 when the Board of Governors of the American Bar Association established a Commission on the Mentally Disabled, a 17-member interdisciplinary body charged with promoting effective legal assistance to the mentally disabled, and with recommending and implementing programs designed to correct pervasive deficiencies in the nation's mental disability system. Since its inception, the Commission on the Mentally Disabled has focused its efforts toward, *inter alia*: mobilizing, activating, and awarding grants to local and state bar associations to encourage legal representation of the mentally disabled (including appropriate substantive technical assistance); establishing and publishing the *Mental Disability Law Reporter* (hereinafter MDLR), an interdisciplinary journal which reports significant developments in the mental disability law field; operating a model in-house patient advocacy project at three state hospitals in Pennsylvania; and developing model legislation to secure rights and services for mentally retarded and other developmentally disabled persons.

The Commission on the Mentally Disabled has been active in shaping Association policy with respect to the

[1] The Association established a Special Committee on the Rights of the Mentally Ill 34 years ago; this committee's recommendations led ultimately to the publication of a number of path-breaking studies by the American Bar Foundation, created by the Association in 1952. *See* Lindman & McIntyre, *The Mentally Disabled and the Law* (1961); Rock, Jacobson, & Janopaul, *Hospitalization and Discharge of the Mentally Ill* (1968); Matthews, *Mental Disability and the Criminal Law* (1970); Brakel & Rock, *The Mentally Disabled and the Law* (rev. ed. 1971).

mentally disabled. Pursuant to a Commission recommendation, the Association's House of Delegates adopted in August 1978, a policy statement calling for increased procedural protections during the civil commitment process, as recommended by the President's Commission on Mental Health in its *Report to the President* (April 1978).

The Association has also taken the lead in establishing standards for the administration of justice, such as its *Standards for the Administration of Criminal Justice* and its *Standards Relating to Trial Courts* (see part 2B, *infra*). In addition, the Association has recently completed a 23-volume tentative draft of juvenile justice standards. Thus, the Association is uniquely experienced and interested in the question now before the Court.

With due consideration of the extended factual legal analysis offered in the briefs of the parties and other *amici*, the Association, with the written consent of the parties,[2] sets forth its views herein on the important question of whether, and to what extent, the Constitution requires procedural safeguards for minors facing civil commitment on the basis of alleged mental disability.

QUESTION PRESENTED BY AMICUS

Whether the Due Process Clause of the Fourteenth Amendment applies to the nominally voluntary but in fact involuntary civil commitment of juveniles on the basis of alleged mental disability,[3] and, if so, whether due process requires substantially the same procedural protections for such children as it does for adults?

[2] Copies of letters indicating the parties' consent have been filed with the Clerk of the Court.

[3] As used herein, the term "mental disability" includes both mental illness and mental retardation.

STATEMENT OF THE CASE

On November 16, 1972, the plaintiffs in *Bartley* v. *Kremens*, 402 F.Supp. 1039 (E.D. Pa. 1975), who were patients in Pennsylvania's Haverford State Hospital, filed a class action pursuant to 28 U.S.C. §§ 1331 and 1343 (3) and 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Pennsylvania. A three-judge court was sought and convened pursuant to 28 U.S.C. §§ 2281 and 2284. The action was brought against the Director of Haverford State Hospital and officials of the Pennsylvania Department of Public Welfare, on behalf of all mentally ill and mentally retarded children (18 years of age or younger) admitted or committed indefinitely to mental institutions under Sections 402 and 403 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 P.S. §§ 4402 and 4403.

The minor plaintiffs alleged that the Pennsylvania statutory procedure constituted a denial of due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States. The statutory provisions in question provided that persons 18 years of age or younger may be institutionalized upon the application of a parent, guardian, or person *in loco parentis*; such institutionalization is considered a "voluntary" admission or commitment.[4] The admission/commitment procedure under challenge provided no opportunity for a hearing or assistance of counsel and merely required a finding by the director of the facility upon admission that the child "is in need of care or observation." Subsequent to plaintiffs' initiation of the action, the Secretary of Public Welfare published regulations which

[4] The record in *Bartley* indicates that "voluntary" admissions or commitments are often against the expressed wishes of members of the plaintiff class, and are frequently based upon reasons unrelated to the mental condition of the child involved. 402 F.Supp. at 1044; A. 210-221.

augmented the challenged statutory procedures (3 Pa. Bull. 1840 (1973)), but which did not address the procedural deficiencies claimed by plaintiffs.

On July 24, 1975, the District Court ruled on due process grounds, one judge dissenting, that the voluntary admission and commitment procedures of 50 P.S. §§ 4402 and 4403 were unconstitutional as applied to children 18 years of age or younger. *Bartley* v. *Kremens*, 402 F. Supp. 1039, 1054 (hereinafter cited as *Bartley*). Central to the court's holding was its determination that a "child's interest in not being institutionalized . . . is safeguarded by the Fourteenth Amendment." 402 F.Supp. at 1046-47. The District Court specifically rejected defendants' argument that due process protections should not apply because the state is acting as *parens patriae* and not as an adversary in the admission/commitment of children, and because the admission/commitment proceedings are civil, not criminal, in nature. The court held that such reasoning ignores the fact that the child in question is involuntarily removed from his home and community, the stigma associated with civil commitment, and the possibility of erroneously and wrongfully depriving children of their liberty by committing them to mental institutions without proper fact-finding procedures. 402 F. Supp. at 1045-1047. The court also found, on the basis of facts in the record, that "[i]n deciding to institutionalize their children, parents, as well as guardians *ad litem* or persons standing *in loco parentis*, may at times be acting against the interest of their children," and thus should not be authorized to waive personal constitutional rights of their children. 402 F.Supp. at 1047-48. The District Court also enumerated a range of procedural guarantees which it said must be afforded prior to institutionalization of plaintiff class members on the basis of alleged mental disability.

The defendants appealed the judgment of the District Court to this Court pursuant to 28 U.S.C. § 1253, and

made application for a stay pending appeal. A stay was denied by the trial court but subsequently granted by this Court on December 15, 1975. Probable jurisdiction was noted by this Court on March 22, 1976. On July 9, 1976, the Pennsylvania legislature enacted the Mental Health Procedures Act of 1976, which repealed the provisions of the 1966 Act, leaving only Sections 402 and 403 in effect as they relate to retarded persons. Article II of the 1976 Act specifies the procedures for voluntary inpatient treatment of mentally ill persons. Section 201 of the 1976 Act (50 P.S. § 7201) allows a parent, guardian, or person *in loco parentis* to apply for commitment/admission of a child under age 14. Section 206 (50 P.S. § 7206) provides for withdrawal from voluntary inpatient treatment where the parent, guardian, or person *in loco parentis* applies for the release of the committed person under age 14.

On May 15, 1977, this Court ruled that the 1976 Act mooted the claims of the named plaintiffs, and that the 1976 Act and the 1973 Regulations had "fragmented" the class certified by the lower court. *Kremens* v. *Bartley*, 431 U.S. 119, 134 (1977). The case was vacated and remanded "for consideration of the class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims." 431 U.S. at 135.

On May 25, 1978, the District Court ruled that the procedures for voluntary commitment of mentally ill and mentally retarded juveniles, as set forth in the 1966 Act, the 1973 Regulations, and the 1976 Act, were unconstitutional on their face and as applied to plaintiffs, and enjoined their enforcement. In so ruling, the court determined that the action could be maintained on behalf of juveniles under 14 years of age committed under Section 201 of the 1976 Act, and on behalf of juveniles 18 years of age or younger committed under Sections 402

and 403 of the 1966 Act. *Institutionalized Juveniles* v. *Secretary of Public Welfare*, Civ. Act. No. 72-2272 (E.D. Pa. May 25, 1978) (hereinafter cited as *Institutionalized Juveniles*).[3]

The *Institutionalized Juveniles* court reaffirmed its conclusions in *Bartley* that plaintiffs had a liberty interest, protectable under the Fourteenth Amendment, in not being institutionalized without due process of law. *Bartley*, 402 F.Supp. at 1046; *Institutionalized Juveniles*, A. 1076a-77a. This liberty interest was found to encompass protection of the juveniles against physical restraint and confinement, as well as protection of the juveniles' reputation, which was found to be implicated because of the stigma attached to institutional commitment. *Institutionalized Juveniles*, A. 1077a. The court further reaffirmed its earlier holding that parents could not waive the constitutional right of their children not to be deprived of liberty without due process of law (*Bartley*, 402 F.Supp. at 1047, *Institutionalized Juveniles*, A. 1078a), citing the "substantial stigma" attached to institutionalization, the "substantial danger of error in the diagnosis of mental illness and mental retardation," the potential for long-term loss of liberty, and the "substantial potential for conflict between the interests of the parent and child." *Institutionalized Juveniles*, A. 1077a-78a.

The *Institutionalized Juveniles* court also affirmed and elaborated on the procedural due process requirements set forth in *Bartley* at 402 F.Supp. 1053. As set forth in *Institutionalized Juveniles*, the following procedures were required to attend the admission/commitment of plaintiff class members on the basis of alleged mental disability:

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[3] For the convenience of the Court, page references to the text of the *Institutionalized Juveniles* opinion will be made to Volume III of the Appendix, which reproduces the opinion at A. 1051a-1115a.

A. [Notice] Prior written notice of the date, time and place of both the probable cause and full commitment hearings and a statement of the grounds for the proposed commitment; the juvenile's attorney or other representative must be in receipt of notice at least forty-eight (48) hours prior to the initial hearing. Until the Legislature establishes some other procedure consonant with our Opinion and Order, this notice must be sent not only to the juvenile but also to the Clerk of the Court with jurisdiction to be forwarded to the juvenile's attorney.

B. [Counsel] Counsel or other trained representative during all significant stages of the commitment process; if the juvenile is indigent, counsel or other trained representative shall be provided for free.

C. [Presence of Juvenile and Other Hearing Rights] Presence of the juvenile at all commitment hearings, an opportunity to be heard, confrontation and cross-examination of adverse witnesses, and an opportunity to offer testimony of witnesses and other evidence on the juvenile's behalf.

D. [Standard of Proof] A finding by clear and convincing proof at the full commitment hearing that the juvenile is in need of institutionalization.

E. [Probable Cause Hearing] A hearing within seventy-two (72) hours from the date of the initial detention to test whether or not there is probable cause to believe that institutionalization is necessary.

F. [Full Commitment Hearing] A full commitment hearing within two (2) weeks from the date of the initial detention. [*Institutionalized Juveniles*, A. 1093a-94a]

As in *Bartley*, 402 F.Supp. 1053 n.26, the *Institutionalized Juveniles* court specified in its opinion and order at A.1079a, n.48, and its implementing order at A. 1094a, 1096a, and at 1098a, that with the exception of notice

and counsel, all of the above listed protections could be waived in appropriate cases by a child or, in some instances, by counsel or other representative, subject to approval by the "unbiased tribunal" which was to be the forum for the hearings on commitment.*

The defendants appealed the judgment of the District Court to this Court pursuant to 28 U.S.C. § 1253.

Probable jurisdiction was noted by the Court on June 19, 1978, and a stay of the lower court's order was granted by Mr. Justice Brennan on July 25, 1978.

SUMMARY OF ARGUMENT

Civil commitment of an individual on grounds of alleged mental illness/retardation is a constitutionally significant deprivation of personal liberty which carries with it serious adverse consequences and disabilities. Such deprivations and disabilities may not constitutionally be imposed without adequate procedural safeguards where the commitment of the individual is involuntary, in fact or in law. Fact finding procedures are particularly important where, as here, the risk of error is substantial, and where, as here, identification of appropriate less restrictive alternatives may obviate the need for commitment to a mental institution.

The asserted interest of the state in providing treatment to mentally disabled juveniles and in preserving the family unit does not justify a substantially different or less stringent application of the Due Process Clause with respect to mental disability commitments of children.

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* This tribunal was not necessarily required to be a court, *Bartley*, 402 F.Supp. at 1049 n.18, *Institutionalized Juveniles*, A. 1082a, and indeed the state was left free to develop alternative procedural safeguards which would be as effective as those specified by the court. *Bartley*, 402 F.Supp. at 1048 n.16, *Institutionalized Juveniles*, A. 1082a.

While parents, of course, can and should be involved in any decision to institutionalize a child, it cannot be assumed in every case that the parent is acting in the best interest of the child. Thus, the final commitment decision should be made, pursuant to appropriate procedures, by an objective and unbiased tribunal.

ARGUMENT

1. Placement in a Mental Institution Is a Constitutionally Significant Deprivation of Liberty and Carries With It Other Serious and Important Adverse Consequences.

Loss of liberty. Commitment to a mental institution necessarily entails a "massive curtailment of liberty," *Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972), and inevitably affects "fundamental rights." *Baxstrom* v. *Herold*, 383 U.S. 107, 113 (1966). Perhaps the most basic aspect of constitutional liberty is the right to be free from unwarranted physical confinement. *Arnett* v. *Kennedy*, 416 U.S. 134, 157 (1974). Avoiding extreme restrictions on personal liberty such as those imposed by involuntary civil commitment has been held by this Court to be an interest of "transcending value." *In re Winship*, 397 U.S. 358, 364 (1970).

Although there may be differences between the involuntary commitment of an adult, where the state may assume a more active role, and the commitment of a minor, in which the parents are more directly involved,[7] the

[7] As of 1977 the following states had voluntary commitment statutes allowing parents or guardians to commit minors: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada (due process rights, including right to counsel and a hearing, are not forfeited when children are admitted by their parents), New Jersey (modified by state Supreme Court rule November 12, 1974), New Mexico, New York (minor may effect his own releaes), North Carolina (statute declared unconstitutional in *In re Long*, 25 N.C. App. 702, 214 S.E.2d 626 (1975)), North Dakota, Ohio, Oklahoma, Oregon, South Carolina (minor under age 16 may apply for his own release), Tennessee (child may apply for his own release), Utah, Virginia, Washington (consent of minor over age 13 required), West Virginia (minor age 12 and over may apply for his own release), Wisconsin (consent of minor over age 13 required), and Wyoming.

The following states had no age distinction in their voluntary commitment statutes: Iowa, Louisiana, Idaho (but if a parent commits a minor, consent of the parent is required for release), Minnesota, Nebraska, and Rhode Island. A child's consent is required in Delaware, Maine, Montana, and Texas. Alabama considers commitment of a child by his parents to be involuntary commitment. New Hampshire and Vermont specifically exclude children from voluntary commitment procedures. South Dakota has no voluntary commitment statute. "Due Process Limitations on Parental Rights to Commit Children to Mental Institutions," 48 U. Colo. L. Rev. 235, 236 (1977).

results in terms of physical and emotional deprivations are, if different in kind, at least equal in impact and severity.[8] Adults and children alike are deprived of their basic right to personal liberty; all are removed from their homes, communities, and normal daily activities, and are subjected to the custody and control of persons (usually agents of the state) not of their own choosing.

The commitment of a minor to an institution may be a traumatizing disruption of his life which cannot fail to have far-reaching consequences. A committed child is separated from a known environment of family, friends, and school and plunged into a frightening, unfamiliar world. See *In re Gault*, 387 U.S. 1, 27 (1967). As the court in *J.L. and J.R.* v. *Parham*, 412 F.Supp. 112 (M.D. Ga. 1976) put it, perhaps a bit sentimentally but nonetheless accurately:

[8] Parental or familial involvement is not uncommon in the civil commitment of adults. *See O'Connor* v. *Donaldson*, 422 U.S. 563, 565 (1975), where the petitioner was committed at the instance of his parents and spent 15 years in the Florida State Hospital for the mentally ill.

> Like *O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396, (1975), and the question therein posed and answered, this case raises the most important question of every child's constitutional right to liberty, not only the liberty that includes freedom from bodily restraint, but also the liberty that includes the freedom of an ordinary, every-day child in the United States of America—the freedom to live with mothers, fathers, brothers and sisters in whatever the family abode may be; the freedom to be loved and to be spanked; the freedom to go in and out the door, to run and play, to laugh and cry, to fight and fuss, to stand up and fall down, to play childish games; the freedom to go to school and to frolic with school mates; the freedom to go to Sunday school and church; the freedom to watch and listen or not to watch and listen to television; the freedom to buy candy at the corner store; the freedom to be a normal child in a normal household cared for by normal parents. [*J.L. and J.R.* v. *Parham*, 412 F. Supp. at 136. Footnote and citation omitted.]

Testimony at the trial in this case established the destructive consequences of removing a child from familiar surroundings and the difficulty of subsequent reintegration into his once familiar world (A. 620-621, 990-991).[9] *See* "Minors' Right to Due Process: Does It Extend to Commitment to Mental Institutions?" 52 Notre Dame Law. 136, 140 (1976). The feeling of abandonment occasioned by institutionalization is especially intense for younger children who are adversely affected by such feelings sooner than older children. Goldstein, Solnit & Freud, *Beyond the Best Interest of the Child*, 40-49 (1973). In-

[9] The parties in *Institutionalized Juveniles* stipulated that the evidence admitted in the initial proceeding was to be deemed included in the record of the proceedings in the instant case. *Institutionalized Juveniles*, A. 1066a, n.17. For the convenience of the parties and the Court, the printed Appendix used in this Court in *Bartley* has been used in *Institutionalized Juveniles*.

stitutionalization may also retard the normal intellectual and emotional development of a child.[10] Thus, there is no reason to assume that the institutionalization decision, and the fact of institutionalization, are of any less consequence for minors than for adults (A. 575). If anything, the opposite appears to be the case.

Involuntary treatment. In addition to the deprivation of liberty inherent in an indefinite commitment, such commitment carries with it the risk of physically intrusive treatment which, especially if unwarranted, may violate the committed individual's right to bodily integrity. *See Schmerber* v. *California*, 384 U.S. 757, 772 (1966); *Rochin* v. *California*, 342 U.S. 165 (1952). Such treatment modalities may include forced administration of psychotropic medication, *see Winters* v. *Miller*, 446 F.2d 65 (2nd Cir. 1971), *cert. den.* 404 U.S. 985 (1971); *Scott* v. *Plante*, 532 F.2d 939 (3rd Cir. 1976); *Souder* v. *McGuire*, 423 F.Supp. 830 (M.D. Pa. 1976); aversive conditioning, *see Knecht* v. *Gillman*, 488 F.2d 1136 (8th Cir. 1973); *Mackey* v. *Procunier*, 477 F.2d 877 (9th Cir. 1973); *Wyatt* v. *Hardin*, No. 3195-N (M.D. Ala. February 28, 1975, June 26, 1975, and July 1, 1975), 1 MDLR 55; convulsive therapy, *see Wyatt* v. *Hardin*, *supra*; *Price* v. *Sheppard*, 239 N.W. 2d 905 (Minn. 1976), 1 MDLR 120; *Nelson* v. *Hudspeth*, C.A. No. J75-40(R) (S.D. Miss. May 16, 1977); and even psychosurgery, *see Kaimowitz* v. *Michigan Department of Mental Health*, No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973), 1 MDLR 147.[11]

[10] Glenn, "The Least Restrictive Alternative in Residential Care and the Principle of Normalization," in *The Mentally Retarded Citizen and the Law*, at 499-501 (1976); Hobbs (ed.), *Issues in the Classification of Children*, at 135, 142-143 (1975); Joint Commission on the Mental Health of Children, *Crisis in Child Mental Health: Challenge for the 1970's*, at 321-324, 330-331 (1970); Provence & Lipton, *Infants in Institutions*, at 19 (1962).

[11] *See generally* Friedman, "Legal Regulation of Applied Behavioral Analysis in Mental Institutions and Prisons," 17 Ariz. L.

Of course, not every institutionalized minor will be subjected to hazardous or intrusive procedures, but the fact is that institutionalization, to some degree, confers upon the state (or perhaps upon a private facility through the authority of the state) the power to impose treatment upon an institutionalized individual—treatment which by its very nature may involve "impermissible tinkering with mental processes," *Mackey* v. *Procunier*, *supra*, 477 F.2d at 877, or a violation of the right to privacy. *See Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Obviously, no one, especially a child, should be exposed to the risk of such treatment without prior determination that it is warranted and appropriate.

Stigmatization. As courts have noted,[12] institutionalization on mental disability grounds almost inevitably stigmatizes the individual involved in a way that adversely affects him the rest of his life. Such stigmatization may result in or be accompaniedb y the scorn or obloquy of one's peers, loss of employment possibilities and education benefits, and other civil disabilities that flow from institutionalization (A. 569, 574-575, 621-622, 634, 657).[13]

Rev. 39 (1975), and Plotkin, "Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment," 72 Nw. L. Rev. 461 (1978).

[12] *E.g.*, *Lessard* v. *Schmidt*, 349 F.Supp. 1078, 1088-90 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974), *on remand*, 379 F.Supp. 1376 (E.D. Wis. 1974), *vacated on procedural grounds*, 421 U.S. 957 (1975), *on remand*, 413 F.Supp. 1318 (E.D. Wis. 1976); *In re Roger S.*, 141 Cal. Rptr. 298, 569 P.2d 1286 (Cal. 1977).

[13] *Cf.* Comment, "Developments in the Law—Civil Commitment of the Mentally Ill," 87 Harv. L. Rev. 1190, 1198-1201 (1974) (committed persons "may suffer from the social opprobrium which attaches to treatment for mental illness and which may have more severe consequences then do formally imposed disabilities." Note 6 at 1200.). *Goss* v. *Lopez*, 419 U.S. 565, 579 (1975) ("[Charges of misconduct] could seriously damage the students' standing with their

In these circumstances, *see Paul* v. *Davis*, 424 U.S. 693, 701-705 (1976), an individual's interest in his good reputation is a liberty (or property) interest entitled to constitutional protection. *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971).

The social stigma attached to institutionalization for either mental illness or mental retardation has been well-documented. The President's Commission on Mental Health found the public frightened and repelled by the term "mental illness." *Report to the President*, *supra*, at 55. The Commission's findings confirm the expert testimony in the record in this case regarding stigma, cited immediately above.[14] The Commission's Task Panel on Public Attitudes and Use of Media for Promotion of Mental Health (Appendix-Vol. IV) reported that "ignorance, prejudice, and fear of 'mental illness' and the 'mentally ill' remain widespread throughout America," and attributed much of this stigma to continuing uncertainty regarding causes and cures of mental illness. *Id.* at 1867. The Task Panel further found that the general public is often influenced by news accounts and the popular media, and equates mental illness with violent and anti-social behavior. *Id.*[15]

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fellow pupils and teachers as well as interfere with later opportunities for higher education and employment [footnote omitted]."). *In re Ballay*, 482 F.2d 648, 667-669 (D.C. Cir. 1973). *In re Coleman*, Cir. Ct. No. 76-639-949 AV (Cir. Ct. Wayne County, Mich., Feb. 23, 1977). *See also* "Minors' Right to Due Process," *supra*, 52 Notre Dame Law. at 140.

[14] *See also* Sarbin & Mancuso, "Failure of a Moral Enterprise: Attitudes of the Public Toward Mental Illness," 35 J. Consulting & Clinical Psych. 159 (1970); Fracchia, *et al.*, "Public Views of Ex-Mental Patients: A Note on Perceived Dangerousness and Unpredictability," 38 Psych. Rep. 495 (1976).

[15] This negative public attitude is likewise reflected in the broad range of civil disabilities legislatively imposed upon persons labeled "mentally ill." *See* Note, "Mental Illness: A Suspect Classification?," 83 Yale L.J. 1237 (1974).

The label of mental illness often results in discrimination against the person to whom it is applied. It has been observed that "[k]nowledge of previous psychiatric treatment and/or the possession of a phychiatric label is . . . used prejudiciously to exclude individuals. . . ." American Psychiatric Association, "Position Statement on Discrimination Against Persons with Previous Psychiatric Treatment," 135 Am. J. Psy. 643, 644 (1978). The degree of stigmatization has been found to increase proportionately with the level of treatment and official intervention (Bord, "Rejection of the Mentally Ill: Continuities and Further Developments," 18 Soc. Prob. 496 (1971)), and to produce negative expectations among those whom the person later encounters. This is particularly true in the area of employment, where studies have found potential employers reluctant to hire former patients because such employees are believed to cause problems, to require increased supervision, and to be less responsible.[16]

The stigma of being labeled mentally retarded may be even more devastating, and has been called "uniquely damaging." Teitelbaum and Ellis, "The Liberty Interest of Children: Due Process Rights and Their Application," 12 Fam. L.Q. 153, at 31 (manuscript) (Fall, 1978) (hereinafter cited as Teitelbaum and Ellis. Page citations herein are to manuscript submitted for publication.) The label implies that its holder is incompetent in all areas of practical affairs, and is particularly burdensome in a society such as ours which places a premium on intelligence. *Id.* In addition, retardation, unlike mental illness, is viewed as permanent and incurable. Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded*, 207 (1967); *see* Severance & Gasstrom, "Effects of the Label 'Mentally Retarded' on Causal

[16] Howard, "The Ex-Mental Patient as an Employee," 45 Am. J. Orthopsych. 479, 479-80 (1975).

Explanations for Success and Failure Outcomes," 81 Am. J. Men. Def. 547 (1977). The label has been seen to foreclose vocational options (even when employed, the retarded arte often relegated to unskilled or semi-skilled occupations), and to deny participation in social activities "average" persons take for granted (for example, retarded persons are often prevented from entering into contracts or obtaining driver's licenses). *See* President's Committee on Mental Retardation, *The Mentally Retarded Citizen and the Law*, 214, 220 (1976).

Moreover, the label of mental retardation has a profound effect on the self-image of the person to whom it is applied, almost guaranteeing a "failure life pattern." *The Mentally Retarded Citizen and the Law*, *supra*, at 221.

> To find oneself regarded as a mental retardate is to be burdened by a shattering stigma. . . . These persons cannot both believe that they are mentally retarded and still maintain their self-esteem. . . . [T]he stigma of mental retardation dominates every feature of the lives of these former patients. Without an understanding of this point there can be no understanding of their lives. [*Cloak of Competence*, *supra*, at 204-208.]

The stigma associated with mental retardation is strikingly revealed in the experience of mildly retarded persons who, once released from institutions, often deny the nature of their past confinement: "They employ almost any other excuse, from epilepsy to 'craziness'—excuses that are themselves highly stigmatizing. Never is mental retardation mentioned." *Id.* at 207.

Possibility of inhumane or inadequate treatment. It is unfortunate but true that many of our nation's mental institutions do not provide minimally adequate habilitative or rehabilitative programming, but in fact may subject their patients or residents to inhumane and unsafe

living conditions, destructive psychological pressures, and even physical abuse by other patients or residents or by staff members, all in violation of constitutional guarantees. The President's Commission on Mental Health, in recommending the establishment of advocacy programs for the mentally disabled, has stated that "[w]e are keenly aware that even the best intentioned efforts to deliver services to mentally disabled persons have historically resulted in well-documented cases of exploitation and abuse." *Report to the President, supra*, at 42. As in *In re Gault, supra*, 387 U.S. at 15-21, this Court should take note of this possibility, which has been well-documented by lower federal courts,[17] in determining the procedural protections which should attend the commitment of anyone, especially a child, to a mental institution. In those jurisdictions where substandard conditions exist, the consequences of erroneous institutionalization decisions are especially grave.

[17] *E.g., O'Connor* v. *Donaldson, supra; Wheeler* v. *Glass*, 473 F.2d 983 (7th Cir. 1973); *Evans* v. *Washington*, C.A. No. 76-0293 (D.D.C. June 14, 1978) (consent order); *Wouri* v. *Zitnay*, Civ. No. 75-80-SD (S.D. Maine July 14, 1978) (consent order); *Halderman* v. *Pennhurst State School and Hospital*, 446 F.2d 1295 (E.D. Pa. 1977); *Davis* v. *Watkins*, 384 F.Supp. 1196 (N.D. Ohio 1974); *Welsch* v. *Likins*, 373 F.Supp. 487 (D. Minn. 1974), *enforced*, No. 4-72-Civ. 451 (D. Minn. October 1, 1974), 1 MDLR 193, *aff'd in part* 550 F.2d 112 (8th Cir. 1977), 1 MDLR 334; *New York State Association for Retarded Children and Parisi* v. *Rockefeller*, 357 F.Supp. 752 (E.D.N.Y. 1973), *modified*, No. 72-C-356/357 (E.D.N.Y. May 23, 1973), *order on consent sub nom. New York State Association for Retarded Children and Parisi* v. *Carey*, No. 72-C-356/357 (E.D.N.Y. April 30, 1975), *approved*, 393 F.Supp. 715 (E.D.N.Y. 1975), 1 MDLR 58; *Romeo* v. *Youngberg*, C.A. No. 76-3429 (E.D. Pa. June 6, 1977); *Vanderzeil* v. *Hudspeth*, C.A. No. J76-262 (R) (S.D. Miss. Feb. 11, 1977); *Horacek* v. *Exon*, 354 F.Supp. 71 (D. Neb. 1973), *order on consent*, No. 72-L-299 (D. Neb. October 31, 1975); *Wyatt* v. *Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971), 334 F.Supp. 1341 (M.D. Ala. 1971), 344 F.Supp. 373 and 387 (M.D. Ala. 1972), *aff'd sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974). *Cf.* Gruenberg, "The Social Breakdown Syndrome—Some Origins," 123 Am. J. Psychiatry 12 (1967); Barton, *Institutional Neurosis* (2d ed. 1966); Goffman, *Asylums* (1961).

As with all the other types of deprivations and adverse consequences cited in this part, no reason appears why such infringements of constitutionally protected rights are of any less consequence in the case of children than they are in the case of adults (A. 575).

Deleterious effect on intellectual and emotional development. Prolonged institutional treatment of mentally ill or retarded children presents the threat of serious long-term effects on cognitive, emotional and social development, and therefore should be considered only as a last resort. *See*, Glasscote *et al.*, *Children and Mental Health Centers*, 20 (1972); Joint Commission Report, *Crisis in Child Mental Health, supra*, at 269; A. 474-475a, 582a, 590a, 620-622a, 631a, 633-634a. Studies of young children in institutions document that "most infants living in institutions do not get enough mothering [considered necessary for the formation of close personal relationships and the development of inner-self controls] in purely quantitative terms." Provence & Lipton, *supra*, at 19 (1962). Further, a child growing in an institution rarely receives the individualized responses necessary as he experiments in physical and mental skill development. *See*, Flint, *The Child and the Institution*, 16 (1966); Bowlby, *Child Care and Growth of Love*, 61 (1953). Children in institutions are also unlikely to be exposed to the stimuli and challenges necessary to a growing child. *The Child and the Institution, supra*, at 15. Nor does life in an institution offer children opportunity for integration into community life. Since they are denied community contact, the behavior of institutionalized children "as young adults reflects their lack of contact with normal people during their developmental period." Leland & D. Smith, *Mental Retardation: Present and Future Perspectives*, 86 (1974); Glenn, *supra*, at 499.

The resulting psychological and developmental harms are manifold. Institutionalized children or adolescents

typically have low scores on intelligence tests, poor progress in school, and deficiencies in emotional and social development. Studies indicate that these harms accelerate with the length of institutionalization, the age at which the child was first admitted, and the conditions in the institution. Hobbs, *The Futures of Children*, 135, 142-143 (1975). These deficiencies typically persist even after the institutionalized infant is removed to a family environment.[18]

Mentally retarded children, particularly the young, are even more profoundly affected by institutionalization. Several studies comparing the development of institutionalized retarded children with non-institutionalized retarded children clearly demonstrate the superior development of non-institutionalized retarded children. *See* Stimpson, *et al.*, "Effects of Early Institutionalization on Growth and Development of Young Children with Down's Syndrome," 67 Mich. Med. 1213 (1968); Centerwell and Centerwell, "A Study of Children with Mongolism Reared in the Home," 25 Pediatrics 678 (1961) (comparisons of matched institutionalized and non-institutionalized children afflicted with mongolism show consistently higher IQ's in home-reared children); Lyle, "The Effect of an Institution Environment Upon the Verbal Development of Imbecile Children," 1 J. Men. Def. Res. 1, 12, 21 (1960); Sternlight and Seigel, "Institutional Residence and Intellectual Functioning," 12 J. Men. Def. Res. 119, 123 (1968) (similar findings as to comparative verbal functioning between non-institutionalized and institutionalized retarded children, with the difference in verbal ability attributed to the institutional environment itself); and

[18] Provence & Lipton, *supra*, at 150-155. *See also* Youngleson, "The Need to Affiliate and Self-Esteem in Institutionalized Children," 26 J. Personality and Soc. Psychology 280 (1973); Tizard & Rees, "The Effect of Early Institutional Rearing on the Behavior Problems and Affectional Relationships of Four-Year-Old Children," 16 J. Child Psychology-Psychiatry 61 (1975).

Kaufman, "The Formation of a Learning Set in Institutionalized and Non-Institutionalized Mental Defectives," 67 Am. J. Men. Def. 601, 604 (1963) (comparison of matched groups of institutionalized and non-institutionalized mentally retarded children demonstrates superior ability of non-institutionalized children to form learning sets, *i.e.*, to learn from experience). Other studies suggest that institutionalized retarded children's motor development is inhibited by conditions of institutional confinement such as lack of stimulation, enforced quiescence, and verbal chastisement following active or experimental behavior.[19]

2. Confinement in a Mental Institution Cannot Be Constitutionally Imposed by the State or Under the Authority of State Law Without Adequate Procedural Safeguards.

This Court has repeatedly determined that prior to a deprivation of a constitutionally protected interest, the Due Process Clause demands that procedures be established to determine the necessity and legal justification for the proposed deprivation. This Court has adopted a flexible approach by tailoring the procedural requirements according to the weight of the competing individual, governmental or societal interests at stake. *See, e.g.*, *Matthews* v. *Eldridge*, 424 U.S. 319 (1976);[20] *Wolff* v. *Mc-*

[19] Klaber & Butterfield, "Stereotyped Rocking—A Measure of Institution and Ward Effectiveness," 73 Am. J. Men. Def. 13, 18-19 (1968); Kaufman, "The Effects of Institutionalization on Development of Stereotyped and Social Behaviors in Mental Defectives," 71 Am. J. Men. Def. 581 (1967); Mosley, *et al.*, "Effects of Social and Non-Social Stimuli on the Stereotyped Behaviors of Retarded Children," 74 Am. J. Men. Def. 809 (1970).

[20] *Matthews* is the most recent enunciation by this Court of the factors to be considered in determining the adequacy of due process procedures. These factors are: 1) the private interest that will be affected by the official action; 2) the risk of erroneous deprivation under existing procedures, and the value of alternate procedural safeguards; and 3) the government's interest, including the burden

Donnell, 418 U.S. 539 (1974); *Morrissey* v. *Brewer*, 408 U.S. 471, 481-90 (1972); *Bell* v. *Burson*, 402 U.S. 535, 539-42 (1971); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254, 263-71 (1970); *Cafeteria Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961).

While this Court has not ruled directly on the procedural requirements for civil mental disability commitments, it has mandated strict procedural safeguards in the analogous areas of quasi-criminal commitments, *Specht* v. *Patterson*, 386 U.S. 605 (1967), and institutionalization of juvenile delinquents, *e.g.*, *In re Winship*, *supra*; *In re Gault*, *supra*. Indeed, the Chief Justice noted in his concurring opinion in *O'Connor* v. *Donaldson*, *supra*, 422 U.S. at 580, that

> [t]here can be no doubt that involuntary commitment to a mental institution, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law. . . . Commitment must be justified on the basis of legitimate state interest, and the reason for committing a particular individual must be established in an appropriate proceeding. [Citations omitted.]

Numerous lower federal courts, relying in part on the above-cited cases, have struck down civil commitment

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imposed by alternate procedures. For an exhaustive analysis of "voluntary" commitment of allegedly mentally retarded children in terms of the *Matthews* criteria, see generally, Teitelbaum and Ellis, *supra*.

This Court has recently emphasized the importance of preventing erroneous deprivations of protected rights:

> Procedural due process rules are meant to protect persons not from deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process. . . ." [*Carey* v. *Piphus*, 98 S.Ct. 1042, 1050 (March 21, 1978). (Citations omitted.)]

statutes found to be deficient in procedural safeguards. *Stamus* v. *Leonhardt*, 414 F.Supp. 439 (S.D. Iowa 1976); *Suzuki* v. *Quisenberry*, 411 F.Supp. 1113 (D. Hawaii 1976), 1 MDLR 46; *Goldy* v. *Beal*, 429 F.Supp. 640 (M.D. Pa. 1976), 1 MDLR 137; *Doremus* v. *Farrell*, 407 F. Supp. 509 (D. Neb. 1975); *Kendall* v. *True*, 391 F.Supp. 413 (W.D. Ky. 1975); *Lynch* v. *Baxley*, 386 F.Supp. 378 (M.D. Ala. 1974); *Bell* v. *Wayne County*, 384 F. Supp. 1085 (E.D. Mich. 1974); *Lessard* v. *Schmidt*, *supra*; *Dixon* v. *Attorney General of the Commonwealth of Pennsylvania*, 325 F.Supp. 966 (M.D. Pa. 1971). *Cf. State ex rel. Hawks* v. *Lazaro*, 202 S.E. 2d 109 (W. Va. 1974); *Denton* v. *Commonwealth*, 383 S.W. 2d 681 (Ky. 1964).

Deficiencies in procedural safeguards attending civil commitments have also caused concern in other quarters, and recently have been scrutinized by two nationally prominent groups. The President's Commission on Mental Health, in its *Report to the President*, *supra*, at 43 recommended that "[e]ach state review its civil commitment and guardianship laws and revise them, if necessary, to incorporate increased procedural protections." The annotation to the recommendation cites various procedural safeguards deemed appropriate, including the rights to present evidence, to subpoena and cross-examine witnesses, and to be represented by counsel. *Id.* at 70-71.

The American Bar Association has echoed the concern of the President's Commission, and has gone on record in support of adequate procedures in the civil commitment area. At the Association's Annual Meeting in August 1978, the House of Delegates endorsed the foregoing recommendation, together with other human rights recommendations made by the President's Commission.[21]

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[21] The complete text of the House of Delegates' policy statement commending, and in part endorsing, the Report of the President's Commission on Mental Health may be found at Appendix B.

The application of such procedural safeguards to the "voluntary" commitment of children on mental disability grounds is well established in the lower courts. Indeed, many courts other than the District Court in the instant case have similarly held due process requirements to be specifically applicable to mental disability commitments of children. *J.L. and J.R.* v. *Parham, supra; In re Roger S., supra; Saville* v. *Treadway*, 404 F.Supp. 430 (M.D. Tenn. 1974); *Kidd* v. *Schmidt*, 399 F.Supp. 301 (E.D. Wis. 1975); *In re Long*, 25 N.C. App. 702, 214 S.E. 2d 626 (Ct. App. N.C. 1975). *Cf. Pima County Public Fiduciary* v. *Superior Court*, 546 P.2d 354 (Ariz. Ct. App. 1976).

A. *The District Court's Emphasis on the Right to Adequate Notice and to Counsel Was Appropriate in Light of Applicable Precedent and the Factual Record.*

The lower court cases have concluded, in particular, that the requirements of due process include the right to meaningful notice given sufficiently in advance of any proceedings so as to apprise the individual of the grounds for the proposed commitment along with the procedural and substantive rights afforded him. *Suzuki* v. *Quisenberry, supra*, 411 F.Supp. at 1127; *Doremus* v. *Farrell, supra*, 407 F.Supp. at 515; *Lynch* v. *Baxley, supra*, 386 F.Supp. at 388; *Bell* v. *Wayne County, supra*, 384 F. Supp. at 1092; *Lessard* v. *Schmidt, supra*, 349 F.Supp. at 1092. In addition, the lower court opinions have uniformly held that an individual faced with the prospect of involuntary commitment for an indefinite period is entitled to the effective assistance of counsel, including the appointment of counsel if the individual cannot afford retained counsel, and that counsel must be made available far enough in advance of any hearing to provide adequate opportunity for preparation. *Suzuki* v. *Quisenberry, supra*, 411 F.Supp. at 1129; *Doremus* v. *Farrell, supra*,

407 F.Supp. at 516; *Lynch* v. *Baxley, supra*, 386 F. Supp. at 389; *Bell* v. *Wayne County, supra*, 384 F.Supp. at 1093-94; *Lessard* v. *Schmidt, supra*, 349 F.Supp. at 1097-98. *Cf. Heryford* v. *Parker*, 396 F.2d 393, 396 (10th Cir. 1968).

In the instant case, the court mandated that notice and the appointment of counsel or other trained representative be nonwaivable, although other procedural requirements may be waived if an unbiased tribunal finds that such a waiver is in the best interest of the child. *Bartley*, 402 F.Supp. at 1053 n.26; Order of November 17, 1975 (A. 831), *Institutionalized Juveniles*, A. 1094a, 1096a, and 1098a. This approach takes into account the unique aspects of a juvenile mental disability commitment, where the child may in certain situations be subject to more implicit or explicit coercion and less likely to appreciate or comprehend the nature of the proceedings,[22] and in other cases may, after consultation with counsel, be in a position to dispense with other formal procedures. Thus the court below merely adopted a logical method to prevent abusive practices in securing waivers and to eliminate time-consuming and unnecessary challenges to a child's commitment.

Supplementing the legal authority for the appointment of counsel[23] was testimony by mental disability experts at the trial who agreed that counsel played an important therapeutic role in the proceedings for all involved. The testimony indicated that the advocate for the child is the only individual who can be perceived by the child as representing his or her interests in the commitment pro-

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[22] *See* A. 590, 630-631, 1019a.

[23] *See also* "Minors' Right to Due Process," *supra*, 52 Notre Dame Law. at 142, 144, which advocates "[t]he appointment of *medical and legal* advocates . . . [as] an appropriate means of ensuring that the child's interests are given full judicial consideration" (at 144, emphasis added).

ceedings. Despite assurances to the contrary from parents or the psychiatrist, the child is likely to perceive their roles as adversarial. Appointment of counsel for the child thus decreases the chance that the child will feel "railroaded" and makes him or her more amenable to treatment if commitment is ordered (A. 542-544, 1014a-1015a).

B. *The Right to Counsel, in Particular, Has Been Emphasized by the American Bar Association as a Matter of Sound Judicial Administration.*

Appointment of counsel along the lines of the lower court's order has been incorporated into the *Standards Relating to Trial Courts* drafted by the American Bar Association Commission on Standards of Judicial Administration and adopted by the Association's House of Delegates at its mid-year meeting in February, 1976.[24] Section 2.72 of the trial court standards,[25] which sets forth the procedural requirements for civil commitment proceedings, specifically provides that persons subject to such proceedings are entitled to the assistance of counsel as provided in Section 2.20. That section, in addition to permitting a litigant to employ counsel in any judicial proceeding, requires that counsel be appointed for persons unable to afford their own counsel when they are "subject to a civil proceeding in which the result may be detention for a period of longer than 72 hours."

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[24] The Association's House of Delegates has also adopted policies urging the establishment of advocacy programs for the mentally disabled in all states and "recognizing the importance of counsel to represent not only the mentally disabled client (or those acting in his or her behalf) but also the state or provider against which a claim is made" in adversary or judicial settings. (For full texts, see Appendix B to this brief.)

[25] The complete text of Section 2.72 and accompanying Commentary are attached as Appendix A to this brief.

In its commentary with regard to this standard, the Commission on Standards of Judicial Administration noted:

> In addition to representation in criminal cases, counsel should be appointed to represent any person who is the subject of a civil proceeding in which the result may be his physical commitment or detention. Such proceedings include commitment of the mentally ill, mentally deficient, narcotics addicts, alcoholics, "defective delinquents," "sexual psychopaths," and similarly defined persons. The distinction between these procedures and criminal prosecution is often more theoretical than real, for the state plays an adversary role, as in criminal cases, and the consequence of adjudication may be long confinement—sometimes for an indefinite period—in an institution where the conditions of custody to a greater or lesser degree resemble a prison. A like necessity for counsel exists in deportation and contempt proceedings. Where the individual involved is mentally disturbed or deficient, or lacks facility in speaking English, the need for counsel is all the more urgent because the person cannot speak effectively for himself.

Clearly, the commitment of a minor falls within the type of situation contemplated by Standard 2.20.[26]

As noted *supra*, the court below enumerated other procedural rights for children facing commitment, all of which find support in some or all of the authorities

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[26] The critical role of counsel for children is also discussed at length in draft standards relating to the juvenile justice system which were recently published by the Juvenile Justice Standards Project. The Project, a joint venture of the Institute of Judicial Administration and American Bar Association, has produced a draft twenty-three volume series covering the entire field of juvenile justice administration. At present, the standards have not been approved by the American Bar Association, but are scheduled to be considered at the Association's 1979 mid-year meeting. IJA-ABA, *Standards Relating to Counsel for Private Parties* (Tent. Draft, 1977).

supporting *amicus*' arguments herein.[27] *Amicus* would point out also that Section 2.72 of the above described trial court standards and the order entered by the court below are strikingly similar, in that both contemplate a preliminary and final hearing, the right to notice, counsel, and personal presence at such hearings, along with the rights of confrontation and cross-examination and of presenting evidence on one's own behalf.

C. *The District Court Was Correct in Finding That the Pennsylvania Scheme for Admission or Commitment of Children Does Not Satisfy the Requirements Enumerated Above.*

A plain reading of the commitment scheme established by Pennsylvania law[28] demonstrates that it affords children subject to institutionalization none of the procedural safeguards mandated by the above cited constitutional decisions or endorsed by the American Bar Association.

The overriding flaw in the challenged procedure is its failure to require a hearing in all cases, absent a valid waiver. Equally important, the Pennsylvania approach fails to require that such a hearing be held before an unbiased tribunal, and that counsel or other trained representative be appointed. The 1973 Regulations fail to cure, and the 1976 Act perpetuates, these fatal defects.

Neither Sections 402 and 403 of the 1966 Act, nor the 1973 Regulations, require any hearing prior to admission/commitment. Rather, they provide for referral and evalu-

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[27] The utility of particular procedural safeguards may vary to some extent depending on the age and maturity of the child involved.

[28] Sections 402 and 403 of the 1966 Act (50 P.S. §§ 4402 and 4403), together with the 1973 Regulations (3 Pa. Bull. 1840 (1973)) govern the admission/commitment of children alleged to be mentally retarded. Sections 201 and 206 of the 1976 Act, and to the extent it applies to children under age 14, Section 205 of that Act (50 P.S. §§ 7201, 7206, and 7205) govern the commitment of children alleged to be mentally ill.

ation, subject to the institution director's independent examination. This structure was found by the expert witnesses to be inherently unreliable.[29] Moreover, the expert witnesses concluded that placing sole reliance on psychiatric, psychological, or other professional diagnosis without recourse to review by an unbiased tribunal, will not suffice to prevent unnecessary or inappropriate commitments (A. 550, 585, 604, 1006-11a).[30]

These provisions also fail to provide for the automatic appointment of an advocate to represent the child's interest. Further, the nominal safeguards contained in the 1973 Regulations are inapplicable to children under age 13.

The 1976 Act perpetuates the flaws of the earlier provisions by failing to require any hearing. Although Section 205 (50 P.S. § 7205) requires an "individualized treatment plan" for each child, it fails to assure the independence of the treatment team formulating the plan. Thus, this procedure is essentially similar to that found

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[29] In summary, these experts felt that the regulations did not ensure adequate evaluation of the child; that there was a tendency for psychiatrists to agree among themselves for reasons unrelated to the needs of the patient; that admitting psychiatrists at an institution may be unduly influenced by institutional demands; that once institutionalized, individuals tend to accede to the institution's point of view, and in spite of the notice requirements, an individual may not be able to express his objections (A. 558, 561, 598, 628-629, 630-631). It should also be noted that the Regulations contain no assurance that the interests of the child will be weighed in making the commitment decision (A. 1084a-1085a).

[30] *See also*, Teitelbaum and Ellis, *supra*, at 44:

> At first glance, it might appear that the involvement of such professionals [physicians or other professionals] would provide sufficient check on ill-advised parental action and that additional protections would be unnecessary. However, as is the case of parental commitment of children as mentally ill, the professionals involved do not adequately perform the function of screening out children who are inappropriate for institutionalization. [Footnote omitted.]

unacceptable by the expert witnesses considering the 1973 Regulations (n.29 *supra;* A. 1086 at n.60). In addition, the 1976 Act fails to require a post-commitment hearing within a reasonable time after commitment, thus subjecting it to the above criticism of placing sole reliance on psychiatric opinion. Finally, the 1976 Act has no provision requiring that an advocate be appointed to represent the interests of the child.

D. *The Labeling of Juvenile Mental Disability Commitments As Civil (Rather Than Criminal), Benevolent, or Voluntary Does Not Affect the Applicability of the Due Process Clause.*

This Court has long avoided the labeling of a particular proceeding as "civil" rather than "criminal" and has imposed due process requirements when it was clear that the potential existed for serious deprivation of constitutionally protected interests. *E.g., Breed* v. *Jones*, 421 U.S. 519, 530 (1975); *In re Gault, supra; Specht* v. *Patterson, supra; cf. Heryford* v. *Parker, supra*, 396 F.2d at 396. The same deprivations threatened in these prior juvenile and quasi-criminal "civil" proceedings are present here, and the same reasoning should apply. *Institutionalized Juveniles*, A. 1077a. Appellants in their brief to this Court attempt to circumvent this authority by contrasting the medical determination in the present case to the finding of guilt in *In re Gault*. Appellant's brief, p. 41. This reasoning ignores the essence of these cases, which turn on the nature of deprivation involved. Finally, the statutory characterization of these admissions and commitments as "voluntary" should not mask the fact that they are voluntary on the part of the parent (or other person or agency seeking institutionalization), but not on the part of the child being deprived of his liberty. Thus, the requirements of due process should apply.

E. *The Imposition of Due Process Protections Upon the Institutionalization Decision is Necessitated Both by the Risk of Erroneous Psychiatric and Other Judgments and by the Need to Ensure That Less Restrictive Alternatives Are Adequately Explored.*

The deprivation and consequences of institutionalization described in the first section of *amicus*' argument would, in themselves, require that institutionalization decisions made by or through the authority of the state be subject to the requirements of the Due Process Clause. The special nature of the admission/commitment decision, however, demands the type of procedural safeguards mandated by the District Court for at least two further reasons—the uncertainty of psychiatric (and other) diagnoses and the need, from both a professional and constitutional standpoint, to place an allegedly mentally disabled person in the least restrictive setting which will meet his treatment needs.

The Chief Justice has recently noted the "uncertainties" of diagnosis and therapy in the "baffling" field of psychiatry and has observed, correctly, that "the reported cases are replete with evidence of the divergence of medical opinion in this vexing area." *O'Connor* v. *Donaldson*, 422 U.S. at 579 (Burger, C.J., concurring). This Court has previously remarked upon "the uncertainty of diagnosis in this field and the tentativeness of professional judgment." *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956); *cf.* Ennis & Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 Calif. L. Rev. 693 (1974). Diagnosis of mental retardation is equally uncertain[31] (A. 979a-

[31] *See e.g.*, Menolascino, "Emotional Disturbance and Mental Retardation," 70 Am. J. Men. Def. 248, 250 (1965), which found that of 616 children identified as mentally retarded, 191 had predominantly psychiatric problems (for whom mental retardation treatment offered no help, and who might well have been more appro-

982a; Teitelbaum and Ellis, *supra*, pp. 35-47), especially in the case of very young children. Teitelbaum and Ellis, *supra*, at 38.

Expert testimony in the instant case indicated that an admission/commitment hearing, or even the knowledge that a hearing may be requested, will encourage psychiatrists to exercise greater care in evaluating prospective patients and thus diminish the chance for an erroneous decision (A. 543-44, 640-41). The pendency of a hearing will also dilute the tendency of some psychiatrists to overdiagnose or to err on the side of caution, assuming disease over health. *See* Ellis, "Volunteering Children: Parental Commitment of Minors to Mental Institutions," 62 Calif. L.Rev. 840, 865 (1974); Rosenhan, "On Being Sane in Insane Places," 113 Santa Clara L. Rev. 379 (1973). Given the uncertainties in the field of mental disability, and the difficulty in relating psychiatric or psychological diagnoses to legal standards for commitment,[32] proper fact-finding procedures are a practical and constitutional necessity in the civil commitment process (A. 1008a-9a).

Moreover, it is no longer open to serious question that state-imposed deprivation of personal liberty for purposes of mental disability treatment, or any other such incursion on constitutionally protected liberties, must be only to the limited extent necessary to accomplish the legitimate purpose of the deprivation or limitation in question. *Shelton* v. *Tucker*, 364 U.S. 479, 488-490 (1960). Numerous lower federal courts have recognized

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priately treated in some other way), and 40 were found to be not mentally retarded at all.

[32] Shah, "Dangerousness: Some Definitional, Conceptual, and Public Policy Issues," in *Perspectiveness in Law and Psychology* (B. Sales ed. 1977); Shah, "Some Interactions of Law and Mental Health in the Handling of Social Deviance," 23 Catholic U. L. Rev. 647 (1974).

the applicability of this "least restrictive alternative" doctrine to commitment and treatment of the mentally disabled. *Halderman* v. *Pennhurst State School and Hospital, supra; Wouri* v. *Zitnay, supra; Evans* v. *Washington, supra; New York State Association for Retarded Children and Parisi* v. *Carey, supra*, Order of April 30, 1975, 1 MDLR 58; *Lynch* v. *Baxley, supra*, 386 F.Supp. at 392; *Welsch* v. *Likins, supra*, 373 F.Supp. at 501-502; *Lessard* v. *Schmidt, supra*, 349 F.Supp. at 1096; *Wyatt* v. *Stickney, supra*, 344 F.Supp. at 379, 396; *cf. Dixon v. Weinberger*, 405 F.Supp. 974 (D.D.C. 1975),[33] 1 MDLR 12; *Covington* v. *Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Lake* v. *Cameron*, 364 F.2d 657 (D.C. Cir. 1966). Indeed, this Court has specifically applied this rationale to mental disability commitments in *O'Connor* v. *Donaldson, supra*, 422 U.S. at 575:

> May the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community? That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom on their own or with the help of family or friends. See *Shelton* v. *Tucker*, 364 U.S. 479, 488-490.

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[33] In this case, based on the 1964 Hospitalization of the Mentally Ill Act, 21 D.C. Code §§ 501ff., the District Court, in endorsing the least restrictive approach to both commitment and treatment, found not only that some patients in the District of Columbia's mental hospital could fare as well in the community, but also that the treatment needs of 43% of the patients *required* them to be in the community. 405 F.Supp. at 976.

The expert testimony in this case (A. 476-77, 577, 619-621) and the professional literature[34] are in accord with the foregoing legal analysis. Insofar as the class of mentally retarded children is concerned, the testimony revealed little or no benefit in institutionalizing a child and indeed that irreversible harm may very likely result. (A. 991a-92a). Thus, perhaps the most vital function of procedures such as those required by the court below is to prod the parents, professionals, and others involved in the admission/commitment process to avoid unnecessary and inappropriate institutionalization and, if necessary, to invest the resources of other social agencies and the committing tribunal in identifying or creating treatment alternatives which will not unduly limit the personal freedom (or the therapeutic prognosis) of the individual facing commitment.

3. Children Facing Commitment on Mental Disability Grounds are Entitled to Substantially the Same Procedural Protections Afforded Adults Under the Due Process Clause.

As noted above, admission/commitment of children to mental institutions involves at least an equivalent degree of deprivations and risks, and is subject to the same possibility of erroneous or inappropriate diagnosis or

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[34] Glenn, *supra*, at 499-514; Wolfensberger, *The Principle of Normalization in Human Services* (1972); Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Psychiatric Facilities Serving Children and Adolescents*, at 55 (1974). This legal and professional consensus is reflected in the Federal Medicaid regulations governing under-21 inpatient psychiatric services (45 C.F.R. § 249.10(b)(16)(iii), 41 F.R. 2198 (January 14, 1976)) and institutional care and treatment of the mentally retarded (45 C.F.R. § 249.13(a)(2)(iv), 39 F.R. 2220, 2227 (January 17, 1974)). The President's Commission on Mental Health, in its *Report to the President, supra*, has recommended that "each state review its mental health laws and revise them, if necessary, to assure that they provide for: . . . (b) a right to treatment in the least restrictive setting . . ." (at p. 44).

placement decisions, as the involuntary commitment of adults. In the instant case, the only asserted basis for denying to such children the procedural protections due to adults relates to a somewhat vaguely defined state interest in preserving parental authority and family unity. While, as the District Court noted (*Bartley*, 402 F.Supp. at 1048 n.12, *Institutionalized Juveniles* at A. 1077a), parents are often in the best position to assess a child's needs, their legitimate concerns can be accommodated without vesting in them and state authorities unfettered control over the institutionalization of children. The asserted state interest cannot justify the deprivation of children's personal liberty without due process of law.

A. *The Decisions of This Court Indicate That Parental Authority Is Not Without Limits, and That Children, As Well As Adults, Are Entitled to Constitutional Protections.*

This Court has been presented with numerous cases involving the issue of the scope and nature of parental authority in the upbringing of their children and has generally accorded parents great leeway. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 539 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). However, equally as important as the result in *Wisconsin* v. *Yoder*, *supra*, was its carefully circumscribed definition of parents' authority as related to denial of their children's opportunity for a free, public secondary school education. *Id.* at 230-234.[35]

The parental authority recognized by this Court has never been absolute, and where a superseding state interest has been demonstrated, this Court has not hesi-

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[35] Moreover, *Wisconsin* v. *Yoder* turned on First Amendment freedom of religion questions which have no parallel in the instant case.

tated to condone intrusion into the parent-child relationship, primarily in a situation where the child's welfare could be jeopardized:

> But the family itself is not beyond regulation in the public interest. . . . Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. [*Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).]

At the same time, this Court has recognized that minors are entitled to many of the same constitutional rights and protections that adults enjoy, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), particularly with regard to procedural due process. Minors facing the possibility of institutionalization as a result of delinquent behavior have been accorded almost all the procedural safeguards of adult defendants. *See Breed* v. *Jones*, *supra*; *In re Winship*, *supra*; *In re Gault*, *supra*. Due process protections have been accorded to students facing suspensions from school of ten days or less. *Goss* v. *Lopez*, *supra*.[36] Against this background,

[36] This Court's ruling in *Ingraham* v. *Wright*, 430 U.S. 651 (1977) does not undercut due process requirements in the context of the present case. In *Ingraham* v. *Wright*, this Court held that the infliction of reasonable corporal punishment on public school children by teachers could be accomplished without first resorting to an administrative hearing. This case is distinguishable from the case at hand. First, there is a significant constitutional difference between paddling a child and indefinitely committing him to a mental hospital.

Furthermore, as this Court noted in *Ingraham*:

> Were it not for the common law privilege permitting teachers to inflict reasonable corporal punishment on children in their care, and the availability of the traditional remedies for abuse, the case for requiring advanced procedural safeguards would be strong indeed. [430 U.S. 674.]

No readily apparent authority reveals an analogous common law privilege allowing a parent to commit a child to a state mental

it would be anomalous to hold that procedural due process protections should not apply as well to indefinite commitment of minors to mental institutions.

B. *This Court's Decisions With Regard to Abortion Reflect the Proper Balancing of Interests to Be Applied in the Instant Case.*

In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and *Bellotti* v. *Baird*, 428 U.S. 132 (1976), this Court was confronted with the question, *inter alia*, of whether parents could constitutionally prevent their minor daughters from obtaining abortions under circumstances in which, pursuant to *Roe* v. *Wade*, *supra*, an adult woman would have an absolute right to terminate an unwanted pregnancy.

"Constitutional rights," this Court observed, "do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 74. Given that in some instances, the state's authority to regulate children may be broader than its authority with respect to adults, the Court continued, it is necessary

> to examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult.
>
> One suggested interest is the safeguarding of the family unit and of parental authority. [Citation omitted.] It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor

hospital. *See*, Panneton, "Children, Commitment and Consent: A Constitutional Crisis," 10 Fam. L.Q. 295 (1977). Nor is an analogous remedy for abuse available to the inappropriately committed child.

> patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the non-consenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of the privacy of the competent minor mature enough to have become pregnant. [*Planned Parenthood of Central Missouri* v. *Danforth, supra,* 428 U.S. at 75.]

The Court's holding in the *Planned Parenthood* case leads directly to the conclusion that the existence of a conflict between parent and child does not mean the constitutional rights of the child must inevitably give way. Certainly, a child's interest in avoiding a wrongful, inappropriate, and potentially lifelong commitment to a mental institution is equivalent in gravity and importance to a minor's right to obtain an abortion, and the same balancing of interests is required. So examined, the child's interest in not being improperly institutionalized outweighs the parent's (or guardian's) interest in having absolute (or near-absolute) control over the commitment decision.

Moreover, if the state, *qua* state, cannot institutionalize an individual without proper procedural protections, such authority cannot constitutionally be delegated to a parent or other third party. *Planned Parenthood of Central Missouri* v. *Danforth, supra,* 428 U.S. at 69.

C. *The District Court Properly Accommodated the Interests of the Parent and Child in Requiring Due Process Safeguards.*

It must be recalled that the District Court in the instant case did not exclude parents or guardians from

participation in the institutionalization decision, but merely interposed a set of procedural protections and an unbiased tribunal (not necessarily a court) as a check on parental (and professional) authority in this area.

> This finding does not mean that when considering whether or not to institutionalize a child, the state should ignore the opinions and observations of the child's parents. Rather the committing authorities should listen carefully to parents who live with and observe the child on a daily basis for they very likely have invaluable information concerning their child. [*Bartley,* 402 F.Supp. at 1048 n.12.]

Such parental participation is clearly contemplated in the *Institutionalized Juveniles* opinion (A. 1081a-82a), and is fully consistent with the balancing approach adopted by this Court in the above-cited abortion cases. Concurring in *Planned Parenthood of Central Missouri* v. *Danforth, supra,* Mr. Justice Stewart and Mr. Justice Powell indicated that the issue might have been different if, instead of a situation where the parent exercised absolute control over the child's decision, the Court were considering a "provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest."

Such a provision, said the concurring opinion, "would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child." *Planned Parenthood of Central Missouri* v. *Danforth, supra,* 428 U.S. at 91 (Stewart and Powell, JJ., concurring); *cf. Bellotti* v. *Baird, supra,* 428 U.S. at 147.

This Court's opinions thus contemplate that in situations such as the case at bar, an acceptable formulation can be achieved which allows for parental involvement to an appropriate extent while preserving the rights of the minor child involved, and which utilizes a neutral body to resolve these different and potentially conflicting interests. The order of the court below does no more and, indeed, could do no less.

D. *It Cannot Be Assumed That Parents, Faced With Legitimate Familial Problems, Will Always Act in the Best Interest of Their Children With Regard to Commitment to a Mental Institution.*

As found by the court below, parents (or guardians), even with the best of motives, may not act, or be capable of acting, in the best interest of their children in seeking their institutionalization. *Bartley*, 402 F.Supp. at 1047, *Institutionalized Juveniles*, A. 1077a. This does not mean that such parents are acting malevolently or punitively, although a small number may do so.[37] What it does mean is that very often the child's problem is part of a larger familial problem, and that the entire family should be treated as a whole rather than isolating one member of the family in an institution. But familial problems may produce such a level of frustration and anxiety that parents are simply incapable of objectively considering the child's interests when they make the critical

[37] Evidence that parents do not always act in the best interest of their children is best supplied by the examples of child abuse and neglect. The National Center on Child Abuse and Neglect estimates that if comprehensive reporting existed in all jurisdictions, there would be as many as a million reports of abused and neglected children each year: approximately 200,000 abused and 800,000 neglected. It is estimated that 2,000 children die each year from child abuse and neglect-related injuries. "Child Abuse and Neglect Statistical Information Sheet," p. 4 (available from HEW's National Center for Child Abuse and Neglect).

decision of institutionalization (A. 468, 471, 501, 589-590, 601, 617-618, 628, 998a-1005a).[38]

In other words, minors are likely to suffer or be blamed for problems that plague the entire family and for situations that require help for the family as a unit, not just for the child. *See* 402 F.Supp. at 1044; A. 472, 590, 617-618, 630, 1068a. This being the case, the District Court rightly concluded, parents are in no position to waive a child's personal constitutional rights and make institutionalization decisions virtually on their own. *Bartley*, 402 F.Supp. at 1047-1048, *Institutionalized Juveniles* at A. 1077a.

Other courts have also recognized that a child's best interest is not always the motivating factor behind the institutionalization decision. *See, e.g., Heryford* v. *Parker, supra*; *Saville* v. *Treadway, supra*, 404 F.Supp. at 432; *Horacek* v. *Exon, supra*, Order of June 4, 1974; *New York State Association for Retarded Children and Parisi* v. *Rockefeller, supra*, 357 F.Supp. at 762; *In re Long, supra*; *In re Sippy*, 97 A.2d 455 (D.C. Mun. App. 1953). As the Chief Justice put it several years ago,

> [l]awmakers in recent years have been sensitive to the need to make civil commitment difficult, recognizing the dangers of relatives "farming" out their kindred into mental institutions for motives not always worthy. [*Kent* v. *United States*, 401 F.2d 408, 416 n.4 (D.C. Cir. 1968) (1968) (Burger, J., dissenting).]

[38] An institutional superintendent who has surveyed the literature has concluded that "[o]ne consistent finding is that residential care is not sought solely for the reason of mental retardation. In some negative way, a retarded person presents problems beyond the coping ability of the family." R. Scheerenberger, *Deinstitutionalization and Institutional Reform*, 133 (1976). (The author is the current president of the American Association on Mental Deficiency.) *See* Teitelbaum and Ellis, *supra*, pp. 40-44.

Children, especially those who cannot speak for themselves, must be protected from the risk of such inappropriate and harmful decisions.

E. *Claims of Alleged Traumatizing or Disruptive Effects of Due Process Protections for Children Are Not Supported by the Record.*

Appellants contend that a due process hearing prior to institutionalization will have a traumatizing effect on the child or divide and disrupt the family involved. However, in proceedings below, several experts testified that a hearing may be beneficial for both parent and child. Properly administered, a hearing can impart to the child a sense that he is being dealt with fairly. A hearing may also help to relieve parents' anxiety or guilt by removing from them the necessity of making the final decision (A. 480-481, 483, 494-495, 574-578, 597, 623-624, 1014a-1015a).[39] Even assuming some unpleasantness or familial discord, it is hard to conceive of these effects as more traumatizing than the effects of indefinite commitment, especially if the institutionalization turns out to be inappropriate or unnecessary. Further, there may be cases where there is little or no family harmony left to preserve and a hearing will hardly make matters worse (A. 571-572). See the above quoted passage from *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 75.

Thus the reasons advanced for preserving a system in which the child's interests are not assured of representation cannot be supported on the basis of the record in this case, and, even on their face, do not justify the risk of inappropriate or unnecessary institutionalization.

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[39] It should be remembered, again, that a formal hearing will not necessarily be held in every case as a result of the District Court's decision.

CONCLUSION

For the reasons set forth above, the American Bar Association urges this Court to affirm the judgment and decree of the District Court.

Respectfully submitted,

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APPENDICES

APPENDIX A

ABA Commission on Standards of Judicial Administration

*Standards Relating to Trial Courts.**

2.72 Proceedings Concerning Involuntary Care and Treatment.

In civil proceedings for commitment of the mentally ill, and in all other proceedings in which a disposition of a person may be made on account of his mental or physical condition, the court should ensure that the disposition is made on the basis of adequate information, in accordance with applicable law, and with due regard for the rights of the individual and of the public.

(a) *Procedural Requirements.*

(1) The person who is subject to the proceeding and his family or others immediately concerned for his welfare should be given adequate notice and an opportunity to be heard.

(2) The court should formulate clearly the issues to be resolved, with particular regard for the matters to be considered in the course of medical, psychological, or psychiatric examination and to be made the subject of expert testimony.

(3) Clinical evaluation should be made by professionally qualified persons on the basis of examination and other diagnostic procedures that conform to professionally recognized standards. The person who is the subject of the proceeding should be entitled to obtain and present such an evaluation on his own behalf, at public expense if he lacks the means to obtain it himself. Examiners

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* Based on draft approved at February, 1976, mid-year meeting.

should be required to testify as to the extent of their examination and the grounds for their conclusions. Except on stipulation of both parties, the testimony of all witnesses, including expert witnesses, should be presented in open court, subject to cross-examination, and included in the record of the proceeding.

(4) The person subject to the proceeding should be entitled to the assistance of counsel as provided in Section 2.20.

(5) In exercising its power to order care and treatment, the court should consider possible alternative dispositions, imposing only as much restraint as is necessary for protection of the individual, his family, or the public, or for accomplishment of required treatment.

(6) When commitment is ordered, the court should specify its purposes, the terms and conditions of any custody or restraint that may be directed, and a time limit, upon the expiration of which the matter is to be brought before the court for further consideration unless the person has been discharged prior to that time according to law.

(7) Whenever a person is found to be mentally ill or mentally retarded or is committed to an institution where he may be unable to take an active part in management of his property or business interests, and it appears that the commitment may be of long duration, the court should inquire into the nature of such interests and the possibility that guardianship of his property or like safeguards should be established to protect them.

(8) Observational commitments. Involuntary commitments for the purposes of observing the individual's mental or physical condition should be to the least restrictive environment in which the observation can be conducted and only for that period of time which is reasonably necessary to complete such observation.

(9) Emergency commitments. Emergency commitments without judicial proceedings should be permitted only in cases of extreme physical danger to human life, health, or safety, and should not be continued beyond the time reasonably necessary to arrange for a preliminary hearing before a judge.

(b) *Staff Assistance.* The court should have sufficient supporting staff and access to psychiatrists and other professionally qualified experts to carry out its responsibilities under this Section.

COMMETARY

In recent years the traditional procedures for civil commitment of the mentally impaired, and procedures involving defendants in criminal cases who plead insanity or whose competence to stand trial is in question, have been augmented by an array of statutory procedures for commitment of narcotics addicts, alcoholics, and persons mainfesting such types of statutorily defined social deviance as "sexual psychopathy" and "defective delinquency." Because these proceedings are generally termed civil rather than criminal, even when they arise out of criminal prosecution, fewer procedural protections are generally afforded the persons subject to them. The distinction between civil and criminal in many of these cases, however, is more apparent than real. Commitment to an institution on the ground of mental or physical condition is a deprivation of liberty and has many of the characteristics of penal sanctions: confinement (often under harsh conditions), isolation from family and friends, inability to earn a living, persisting social stigma, and sometimes loss of civil and professional rights. Like criminal prosecution, it is often the result of an alleged offense against the law or mores of the community. Procedural safeguards in these cases should not depend on mechanical application of a dichotomy between civil and criminal procedures.

The role of the court in commitment and related procedures should be clearly understood as including responsibility for determining the legal and factual issues that may be presented. The court should not simply ratify recommendations of medical examiners on the assumption that the question is one of medical diagnosis. Statutory definitions of the classes of persons subject to these proceedings do not necessarily correspond to any generally accepted medical diagnostic category. Moreover, psychiatric diagnosis by one diagnostician may differ greatly from that by another who is equally well qualified, and may sometimes be influenced by irrelevant or insubstantial therapeutic, social, or institutional considerations. The lack of precise criteria for determining the potential dangerousness of an individual should be taken into account, as should the tendency of medical witnesses to overpredict dangerous behavior. The medical expert must provide the court with the medical facts and medical opinions essential to a decision, including diagnosis, prognosis, suitability of proposed treatment, prospect of improvement under possible alternative dispositions, and the like. However, the ultimate decision is not essentially a medical one and involves a substantial element of legal discretion. The special problems encountered in these cases make it desirable that judges have been prepared by experience or training for their role. [Reference omitted.]

Notice and an opportunity to be heard should be provided even though the person subject to the proceeding appears to be mentally incapable of acting upon them. Notice may be delivered by a social worker or other trained person acting on behalf of the court who can explain its meaning and offer assistance in obtaining counsel and making preparations for the hearing. Notice of the hearing should also be given to relatives or friends who may assist the respondent or act in his behalf.

Notice should be given sufficiently in advance of scheduled court proceedings to afford a reasonable opportunity for preparation, and should inform the person with particularity of the basis for his detention, his right to counsel and to trial by jury (where available) and the standard upon which he may be detained.

The person who is subject to commitment should be personally present, except where the court finds that he is incapable of attending the hearing or that attending the hearing would worsen his condition or might incite him to injure someone else as a result of hearing the testimony. He should in any event be represented by counsel. See Section 2.20.

Where the respondent is in such a condition that he cannot be present at the hearing, a conference with the judge may allow him to state his case without being required to be present at the formal hearing, but such a conference should not take the place of an evidentiary hearing. Disposition should be made only upon a hearing at which medical and other witnesses are present and subject to cross-examination by counsel and questioning by the court unless the parties agree to presentation on the basis of written documents. Hearings should be on a formal record and decisions based on written findings of facts.

Hearings under sex-psychopath and similar quasi-criminal statutes should provide all the procedural safeguards of a criminal trial. In cases where determination of mental condition is related to criminal proceedings, a separate hearing should be held on mental condition, with adequate notice to the defendant of the questions at issue and the possible consequences of the determination.

The usefulness of medical reports and testimony can often he greatly improved if the court advises examiners

and witnesses in advance of the kinds of information it requires for an informed decision. This can be done through examination forms stating the legal questions before the court (for example, whether the individual is competent to stand trial), and indicating the facts required for a finding on the question at issue (for example, whether he could cooperate with counsel in his own defense). Examiners should be required to state the nature and extent of their examination and the grounds on which they base their findings and conclusions.

Counsel for the respondent should be afforded sufficient time and resources to consult with his client, secure independent professional examination if desired, and inform himself about possible alternatives to commitment. Special training for counsel in mental illness cases can be helpful in improving the quality of representation.

In reaching a disposition, courts should consider all reasonable alternatives such as voluntary hospitalization and treatment in the community without full-time hospitalization. Dispositions should provide for the minimum amount of restraint consistent with accomplishing the purposes of the law.

Commitments should be limited to a relatively short period, at the end of which the necessity of further commitment should be judicially determined. Periodic review of the status of committed persons should be initiated by the court unless a public guardian or defender agency can assume responsibility for doing so. The review should involve notice and formal hearing, with the respondent represented by counsel and medical witnesses subject to cross-examination as in the original commitment proceeding. All reasonable alternatives to commitment should again be considered, and a realistic assessment made of the likelihood of accomplishing further therapeutic objectives by commitment.

APPENDIX B

ABA House of Delegates—Policies Adopted August, 1978

COMMENDATION OF REPORT OF PRESIDENT'S COMMISSION ON MENTAL HEALTH

BE IT RESOLVED that the American Bar Association commends the Report of the President's Commission on Mental Health as an important and valuable study for consideration by officials and citizens concerned with improvement of the nation's mental health system; and

BE IT FURTHER RESOLVED that the American Bar Association endorses those recommendations of the President's Commission on Mental Health providing for protection of the human and legal rights of mentally disabled, i.e., the recommendations within the Report's section on "Protecting Basic Rights" which recommend that:

[1] All Federal agencies enforce existing laws and regulations which prohibit discrimination against mentally disabled persons and seek to equalize opportunities for such individuals.

[2] All Federal agencies review their statutes, regulations, and programs for instances of discrimination against mentally handicapped persons.

[3] The Department of Health, Education and Welfare vigorously implement the requirements of the Education for All Handicapped Children Act and formulate regulations to assist school districts to provide for the mental health needs of children and youth.

[4] Each state review its mental health laws and revise them, if necessary to ensure that they provide for:

a) a right to treatment/right to habilitation and to protection from harm for involuntarily confined mental patients and developmentally disabled individuals;

b) a right to treatment in the least restrictive setting;

c) a right to refuse treatment, with careful attention to the circumstances and procedures under which the right may be qualified; and

d) a right to due process when community placement is being considered.

[5] Each state have a "Bill of Rights" for all mentally disabled persons, wherever they reside.

[6] Mentally disabled persons in detention or correctional institutions should have access to appropriate mental health services on a voluntary basis and such access should not be connected with release considerations.

[7] All recipients of Federal funds to provide mental health services be required to adhere to certain basic principles of confidentiality, and that other institutions and facilities be encouraged to follow this practice.

[8] The establishment of advocacy systems for the representation of mentally disabled individuals. In adversary or judicial settings we recognize the importance of counsel to represent not only the mentally disabled client (or those acting in his or her behalf) but also the state or provider against which a claim is made.

[9] Each State review its civil commitment and guardianship laws and revise them, if necessary, to incorporate increased procedural protections.

STATE ADVOCACY PROGRAMS FOR THE MENTALLY DISABLED

RECOMMENDATION

BE IT RESOLVED that the American Bar Association urges the establishment of advocacy programs for the representation of the mentally disabled in all states, and calls on the Legal Services Corporation to increase its activities so as to ensure more adequate and effective legal services for the mentally disabled poor in institutions and in the community.